SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-479

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W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

JERRY MACK DORROUGH,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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v.

JERRY MACK DORROUGH
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* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing the district court below, entered in the above entitled case on July 29, 1974.

OPINION BELOW

The opinion delivered by the Fifth Circuit Court of Appeals, is reported at 497 F2 1007 (1974), and is appended to this Petition as Appendix "A". The district court order which was reversed by the Court of Appeals is attached as Appendix "B", and the findings and recommendations of the United States Magistrate which were adopted by the district

court are attached as Appendix "C". Also attached as Appendix "D" is a copy of the opinion of the Texas Court of Criminal Appeals dismissing Respondent's appeal from his state conviction on the ground that he had escaped from jail while his appeal was pending. A copy of the judgment is attached hereto as Appendix "E".

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on July 29, 1974 (see Appendix "A").

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Was it erroneous for the Court of Appeals to hold unconstitutional under the Equal Protection Clause a Texas Statute which divests the Court of Criminal Appeals its jurisdiction over appeals pending before it in felony cases when the defendant escapes from custody and does not voluntarily return within ten days?

2. Should the Court of Appeals have ordered the district court to dismiss Respondent's application for a writ of habeas corpus on the ground that Respondent failed to exhaust available state remedies as he is required to do under 28 U.S.C. Sec. 2254?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Fourteen, Sec. 1:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Sec. 2254(b):

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Texas Code of Criminal Procedure, Annotated, Article 44.09:

> "If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the

fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Corrections for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape."

STATEMENT OF THE CASE

Respondent Dorrough was convicted of the felony offense of robbery on February 6, 1963 in the Criminal District No. 3 of Dallas County, Texas. After being sentenced to a term of imprisonment of twenty-five years, he appealed his conviction to the Court of Criminal Appeals, the court of last resort in criminal matters in Texas. While this appeal was pending, Dorrough escaped from custody of the Dallas County Jail but was recaptured within a few days. Upon being notified of Dorrough's escape and the fact that he did not voluntarily return within ten days, the Court of Criminal Appeals dismissed his pending appeal as is required under Article 44.09, Texas Code of Criminal Procedure, Annotated. The Court of Criminal Appeals' opinion dismissing Dorrough's appeal is attached as Appendix "D", and it is significant that Dorrough raised

no objection to this at the time.

In effecting his escape, Dorrough had managed to commandeer a mail truck. As a result, he was indicted and convicted in federal district court for theft of mail and the mail truck. He received a twenty-five year sentence. The state authorities turned Dorrough over to the federal government, and he is presently serving the sentence on his federal conviction in a federal institution in Atlanta, Georgia. In the meantime Dallas County authorities have placed a detainer against Dorrough with the federal authorities. The detainer is based on Dorrough's state conviction and unserved sentence with respect to which his pending appeal was dismissed because of his escape.

The present action was commenced in 1972 when Dorrough filed an action in the United States District Court for the Northern District of Texas seeking to void the detainer. Although Dorrough filed his pro se complaint in the form of a civil rights suit for damages and injunctive relief pursuant to 42 U.S.C. Sec. 1983, the United States Magistrate to whom the case was referred held that the case could not be maintained as a civil rights suit but indeed could be treated as a claim for habeas corpus relief. Under Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), one who is placed under a state detainer warrant is considered to be in custody pursuant to a state court judgment so as to be eligible for federal habeas relief. Thus the federal district court's jurisdiction in this action is based on 28 U.S.C. Sec. 2254.

In the district court Dorrough argued that the

Texas statute on the basis of which his appeal of his state conviction for robbery was dismissed violated the equal protection clause of the Fourteenth Amendment. In addition to offering a rebuttal to this argument, Texas contended that Dorrough's habeas claim was not ripe for adjudication in the federal courts because he had made no attempt to exhause available state remedies. The federal magistrate to whom the case was referred rejected the state's exhaustion argument on the grounds that the Court of Criminal Appeals had had an opportunity to consider Dorrough's equal protection argument when presented with the motion to dismiss his appeal because of his escape from custody and had implicitly rejected this argument when it had proceeded to dismiss the appeal. However, the magistrate upheld the court's handling of Article 44.09 and consequently recommended that Dorrough's application for habeas relief be denied. See Appendix "C". The recommendations of the magistrate were then adopted by the district court. See Appendix "B".

Dorrough then appealed to the United States Court of Appeals for the Fifth Circuit. On appeal Texas merely argued that the district court had been correct in upholding the constitutionality of Article 44.09 and did not argue in the alternative that the district court should have dismissed Dorrough's application for failure to exhaust available state remedies. The Court of Appeals, in its opinion attached as Appendix "A", found that Article 44.09 denied Dorrough equal protection of the laws. The court reasoned that in achieving its purpose of deterring convicts from escaping from confinement the statute drew irrational and unfounded distinction

between those who escaped after being sentenced to a term of years, and those who escaped prior to sentencing or escaped after being sentenced to a life term or death. Because of this unreasonable classification contained within the statute's terms, the court held the statute unconstitutional and ordered the detainer warrant voided unless Texas provides Dorrough with either an effective direct appeal or, if not possible, a new trial.

REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 19, 1(b), a writ of certiorari may be granted when a court of appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court. In the instant case the Fifth Circuit has applied the equal protection clause of the federal constitution in a way not entirely consistent with several relevant Supreme Court decisions.

In its decision the Fifth Circuit held unconstitutional a state statute which requires appeals pending before the Texas Court of Criminal Appeals in felony cases to be dismissed if the defendant escapes from custody and fails to return voluntarily within ten days. The statute in question does not apply to a convicted felon who escapes prior to sentencing because the Court of Criminal Appeals cannot acquire jurisdiction over an appeal, so as to be able to dismiss it, until after sentencing has occurred. McGee v. State, 445 S.W.2d 187, 190 (Tex. Crim. App. 1969). The Fifth Circuit held this provision unconstitutional on the ground that it invidiously discriminates against convicted felons who are sentenced to terms of years.

In reaching this conclusion the Court of Appeals correctly recognized that the cases have not treated equal access to appellate review of state criminal convictions as a fundamental interest. Accordingly, legislation touching upon access to appellate review is not subject to strict scrutiny and struck down unless justified by a compelling state interest. Instead in reviewing legislation of this kind, the courts have applied the rational relationship test. Rinaldi v. Yeager, 384 U.S. 305 (1966) and Griffin v. Illinois, 351 U.S. 12 (1956). Under this method of equal protection analysis a legislative classification will be upheld if rationally related to a legitimate state purpose even though it is not made with mathematical certainty or in practice results in some inequality. See San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973), and Morey v. Doud, 354 U.S. 457 (1957). It is in the application of this test to Article 44.09, that the Court of Appeals erred.

The purpose of Article 44.09 is to defer convicts from escaping from confinement and to encourage those who do escape to return voluntarily. This purpose is entirely reasonable, and in its opinion the Fifth Circuit admits as much. Appellate courts, including the Supreme Court, have traditionally refused to decide the appeals of defendants who escape and refuse to submit to the power of the courts. See Molinaro v. New Jersey, 396 U.S. 635 (1970), Bonahan v. Nebraska, 125 U.S. 692 (1887), and Smith v. United States, 94 U.S. 97 (1876). By enacting Article 44.09, the Texas Legislature merely codified this practice and made it mandatory in the case of all convicted felons.

However, the Legislature apparently decided that the state's interest in deterring escapes is somewhat mitigated when the person whose appeal is being dismissed has been sentenced to life imprisonment or death. In these circumstances the state's interest in deterring escapes is counterbalanced by an alternative state interest in insuring that persons are not subjected to sentences as harsh as life imprisonment or death on the basis of invalid convictions. Accordingly the statute makes a distinction between, on one hand, those sentenced to a term of years and, on the other, those sentenced either to life imprisonment or death. The appeals of escapees in the former category are dismissed if they do not voluntarily return within ten days, whereas the appeals of escapees in the latter category are dismissed only if they have not voluntarily returned or been recaptured within thirty days. Thus Article 44.09 has built into it greater leniency for those who have been given the more severe sentences such as a life term or death; the appeals of escapees who fall into this category are not so readily dismissed.

But it is primarily because of this more lenient treatment accorded those who are given harsher sentences that the Fifth Circuit declared Article 44.09 unconstitutional. The Court of Appeals held that the statute invidiously discriminates against convicted felons who have been sentenced to a term of years. Texas respectfully submits that in so holding the Fifth Circuit misapplied the rational relationship test. Although the distinction drawn by Article 44.09 in favor of convicted felons sentenced to death or life imprisonment may not have been drawn with mathematical precision and may

not be the wisest possible method of achieving the legislative purpose, it nevertheless has a rational basis. In treating escapees sentenced to a term of years differently from escapees sentenced to death or life imprisonment, the Legislature was merely attempting to strike a balance between its interest in deterring escapes and its interest is not so hastily dismissing the appeal of a person who has been subjected to the harsher sentences. While the balance struck by the Legislature may not have been the best one imaginable, it does have a reasonable basis and therefore does not violate the equal protection clause. The Fifth Circuit should not have declared unconstitutional a state statute which furthers the state's legitimate interest in deterring escapes by convicted felons and which does so on the basis of legislative classifications founded in reason. The Supreme Court should grant a writ of certiorari in this case in order to rectify the Fifth Circuit's erroneous application of the rational relationship test and in order to clarify whether, and to what extent, a state can dismiss the appeals of convicted felons who escape without running afoul of the equal protection clause.

In the alternative a writ of certiorari should be granted in order to permit the Supreme Court to review and correct the lower courts' misapplication in this case of the exhaustion doctrine. Under 28 U.S.C. Sec. 2254 an application for writ of habeas corpus from a state prisoner should be denied if the prisoner has not yet exhausted the remedies available to him in the state courts. The reason underlying the exhaustion requirement is to give a state an initial opportunity to pass upon and correct alleged violation of its prisoners' federal rights. Braden

v. Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). All that a prisoner need do in order to satisfy the exhaustion requirement is to present his contention at least once to the state's highest court in criminal cases; it is not necessary for him to urge it time and again under alternative procedures. Fay v. Noia, 372 U.S. 391 (1963), Whipper v. Balkcom, 342 F.2d 388 (5th Cir. 1965), and Grundler v. North Carolina, 283 F.2d 798, 800 (4th Cir. 1960).

In the instant case the district court ruled that Dorrough had exhausted his state remedies even though neither he nor any other petitioner has ever once presented to the Texas Court of Criminal Appeals the constitutional challenge to Article 44.09 raised in this case. The district court recognized that Dorrough had never sought habeas relief in the Texas courts, but it nevertheless concluded that Dorrough's constitutional challenge to Article 44.09 was implicitly rejected by the Court of Criminal Appeals when it dismissed his appeal in 1963 upon a showing that he had escaped. This conclusion is plainly absurd since at the time Dorrough made no appearance, raised no objection, and most certainly did not challenge the constitutionality of the statute pursuant to which his appeal was dismissed. See Appendix "D". While the Court of Criminal Appeals has routinely enforced Article 44.09 over the years, to the state's knowledge the particular constitutional challenge raised by Dorrough has never once been presented to the Court of Criminal Appeals in any case or proceeding. To permit Dorrough to by-pass the state remedies available to him in this case is exactly contrary to the policy underlying the exhaustion doctrine which, if it had been implemented here,

would have afforded the Court of Criminal Appeals at least one opportunity to correct the constitutional defects allegedly present in Article 44.09 before the statute was stricken by the federal courts.

On review the Court of Appeals failed to notice the district court's clearly erroneous treatment of the exhaustion doctrine primarily because the state did not raise the point, choosing instead to argue for affirmance of the district court's judgment solely on the ground that Article 44.09 is constitutional. While ordinarily an appellee's failure to raise a point in favor of a judgment it won below constitutes a waiver of it, the state respectfully submits that the waiver doctrine should not be so readily applied with respect to the exhaustion requirement to a matter of such fundamental importance to federal-state relations. Although under Fay v. Noia, exhaustion is not jurisdictional, a lower court's failure to require it is wholly contrary to its purpose of giving state courts the first opportunity to pass upon their prisoners' constitutional claims, and therefore such a failure should be considered plain error which an appellate court can and should notice at any time. Therefore the Supreme Court should grant a writ of certiorari in order to review and correct the disposition in this case by the lower courts of the exhaustion question.

CONCLUSION

The Fifth Circuit Court of Appeals has misapplied the rational relationship test in declaring unconstitutional a Texas Statute which requires the appeals of convicted felons to be dismissed upon

their escape. A writ of certiorari should be granted so that the Supreme Court can clarify whether, and to what extent limitation can be placed on a convicted felon's right to appeal in order to defer escapes. In the alternative the Supreme Court should grant a writ in order to review and correct the plain error made below in the treatment of the exhaustion requirement, 28 U.S.C. Sec. 2254.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing petition for writ of certiorari has been served on Respondent by placing same in the United States Mail, certified, postage prepaid, addressed as follows: Jerry Mark Dorrough, Box PMB, 87089-131, Atlanta, Georgia 30315, on this the _____ day of October, 1974.

GILBERT J. PENA
Assistant Attorney General

APPENDIX "A"

Jerry Mack DORROUGH, Petitioner-Appellant,

v.

W. J. ESTELLE, Director, TDC, Respondent-Appellee.

No. 73–1881.

**United States Court of Appeals,
Fifth Circuit.**

July 29, 1974.

Prisoner in federal penitentiary petitioned for writ of habeas corpus challenging constitutionality of Texas statute under which his direct appeal from state felony conviction had been dismissed upon his escape from confinement and was not reinstated upon his subsequent recapture. The United States District Court for the Northern District of Texas at Dallas, William M. Taylor, Jr., Chief Judge, denied the petition and prisoner appealed. The Court of Appeals, Wisdom, Circuit Judge, held that Texas statute providing for dismissal of appeals of those defendants convicted and sentenced to terms of years in felony cases and who escape and do not return voluntarily within ten days is irrational in view of its purpose of discouraging convicts from escaping and promoting prompt and voluntary return of those who do escape in that statute does not apply to those who escape prior to sentencing and provides more liberally for reinstatement of appeals of escaping defendants sentenced to death or life terms.

Reversed and remanded.

Rives, Senior Circuit Judge, filed specially concurring opinion.

1. Courts ⇐101.5(4)

Habeas corpus court could consider merits of claim challenging constitutionality of state statute providing for dis-

Synopses, Syllabi and Key Number Classification
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missal of direct appeal upon a defendant's escape from confinement without impaneling a three-judge court. 28 U.S.C.A. §§ 2255, 2281; 42 U.S.C.A. § 1983; Vernon's Ann.Tex.C.C.P. art. 44.09.

2. Constitutional Law ⇐250.2(5), 271

Constitution requires that, when provided, appeals must comport with principles of due process and equal protection. U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⇐250.2(5)

Due process protections may not be used to bootstrap the stricter standard of review for equal protection analysis. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐211

The severity of the detriment caused by classification provides no key to whether the interest infringed is "fundamental" for equal protection purposes. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐211

Under "traditional" equal protection analysis, legislative classifications are permitted if they are rationally related to a legitimate state interest. U.S.C.A.Const. Amend. 14.

6. Constitutional Law ⇐206(1)

The rational relationship test of legislative classifications calls for a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals. U.S.C.A.Const. Amend. 14.

7. Constitutional Law ⇐250.2(5)

Classification created by Texas statute under which all convicted defendants who escape from confinement after being sentenced to term of years and who do not voluntarily return within ten days are deprived of any pending direct appeal could not be sustained on ground that all persons within the classification were treated alike; it was necessary to determine the reasonableness of the classification in light

of the purpose of the law. Vernon's Ann.Tex.C.C.P. art. 44.09; U.S.C.A.Const. Amend. 14.

8. Criminal Law ⇐1131(5)

Texas statute providing for dismissal of any pending direct appeal by convicted defendant who escaped from confinement after being sentenced to term of years and who does not voluntarily return within ten days is irrational in view of its purpose to discourage convicts from escaping from confinement and to promote the prompt and voluntary return of those who do escape in that statute does not apply to those who escape prior to sentencing and provides more liberally for reinstatement of appeals of escaping defendants sentenced to death or life terms. Vernon's Ann.Tex.C.C.P. art. 44.09; U.S.C.A.Const. Amend. 14.

9. Criminal Law ⇐1106(1)

An appeal from conviction is not perfected under Texas law until the record of appeal is filed with the Court of Criminal Appeals. Vernon's Ann.Tex.C.C.P. art. 44.09.

10. Criminal Law ⇐1131(5)

Statutes may constitutionally provide for the immediate dismissal of appeals of escapees. Vernon's Ann.Tex.C.C.P. art. 44.09; U.S.C.A.Const. Amend. 14.

11. Criminal Law ⇐1131(5)

Dismissal or reinstatement of appeals of escapees may be based on established and strictly followed policies, or may be left to the discretion of the appellate court. Vernon's Ann. Tex.C.C.P. art. 44.09; U.S.C.A.Const. Amend. 14.

Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

WISDOM, Circuit Judge:

In this appeal from the district court's denial of his petition for a writ of habeas corpus, Jerry Mack Dorrough attacks the

constitutionality of article 44.09, Vernon's Tex.C[illegible]m. Proc.Ann. Dorrough argues that he was denied equal protection of the laws when his direct appeal from a state felony conviction was dismissed upon his escape from confinement, and was not reinstated upon his subsequent recapture. Article 44.09 strips the Court of Criminal Appeals of jurisdiction in pending appeals by convicted felons who escape from custody, but provides for reinstatement under specified conditions, not met by Dorrough. We hold that the Texas statute violates the equal protection clause of the fourteenth amendment.

Dorrough was convicted in a Texas court of bank robbery and sentenced to twenty-five years confinement. He appealed. While his direct appeal was pending, on May 27, 1963, he and his cellmate escaped from prison, commandeering a United States mail truck to make their getaway. Dorrough was recaptured two days later. He is now serving a twenty-five year sentence in a federal penitentiary for the theft of the mail truck. See 18 U.S.C. § 2114.[1] The State of Texas has filed a detainer warrant against Dorrough for the unserved portion of his state sentence. In this action he seeks to void the detainer.[2]

[1] After Dorrough was recaptured, on motion by the State the Court of Criminal Appeals dismissed his direct

1. Dorrough pleaded guilty to the federal offense. He has challenged his guilty plea four times before this Court under 28 U.S.C. § 2255, each time unsuccessfully. See Dorrough v. United States, 5 Cir. 1964, 327 F.2d 667; Dorrough v. United States, 5 Cir. 1965, 344 F.2d 125; Dorrough v. United States, 5 Cir. 1967, 385 F.2d 887, aff'd en banc, 1968, 397 F.2d 811, cert. denied, 394 U.S. 1019, 89 S.Ct. 1637, 23 L.Ed.2d 44; Dorrough v. United States, 5 Cir. 1971, 440 F.2d 1336, cert. denied, 404 U.S. 915, 92 S.Ct. 239, 30 L.Ed.2d 190.

2. Dorrough has also previously sought to void the detainer, by arguing that the State lost jurisdiction over him by surrendering him to federal authorities. The district court held that Texas had not waived its right to have Dorrough returned for service of his state sentence. We affirmed. See Dorrough v. United States, 5 Cir. 1971, 440 F.2d 1063, cert. denied, 404 U.S. 840, 92 S.Ct. 134, 30 L.Ed.2d 74.

appeal in accordance with article 44.09, Tex.Code Crim.Proc. Ann., which provides:

> If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Corrections for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape.

Arguing that the statute violates the equal protection clause of the fourteenth amendment, Dorrough filed an action in the district court against the State of Texas seeking damages and injunctive relief under the Civil Rights Act, 42 U.S.C. § 1983. The case was referred to a United States magistrate, who held that the suit could not be pursued under the Civil Rights Act, but could be maintained as a claim for habeas corpus relief.[3]

3. The magistrate stated:
I believe it is clear, and I believe the court has already determined by entry of the order permitting the filing of this application, that it cannot be pursued as a civil rights action. I believe it is equally clear, and I believe the court so determined when it entered the order permitting filing of this application, that the relief sought by applicant is in the nature of habeas corpus and that applicant has present status to assert his claim. The State of Texas, who applicant sought to name as a defendant, is not a person amenable to suit under any of the civil rights statutes, including 42 U.S.C. § 1983

The appellee here agrees that the magistrate and the district court were correct in treating Dorrough's complaint as an application for a writ of habeas corpus.

This Court has held that a district court may determine the merits of a habeas claim without the necessity of impaneling a three-judge court. Scott v. District Attorney, E.D.La.1970, 309 F.Supp. 833,

The magistrate substituted the present respondent-appellee for the State of Texas and found that Dorrough was in custody under Braden v. 30th Judicial Circuit Court of Kentucky, 1973, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443, and that state remedies had been exhausted. On the merits, the magistrate found no violation of equal protection and recommended denial of all relief. The district court adopted the magistrate's findings and conclusions and issued an order denying relief.[4] We reverse.

Equal protection analysis is "two-tiered": under the standard most often employed, a state classification will be upheld if rationally related to a legitimate state purpose; but classifications that are "suspect" or that touch on a "fundamental interest" will be subjected to "strict scrutiny" and struck down unless justified by a compelling state interest. See Shapiro v. Thompson, 394 U.S. 618, 655, 89 S.Ct. 1322, 22 L.Ed.2d 600 (Harlan, J., concurring); Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065 (1969). The first fork in the well-traveled road of equal protection analysis, therefore, poses the question of the proper standard of review.

Dorrough urges that a strict standard be employed here. Equal access to criminal appeals, he contends, is a fundamental right and as such may be denied only to serve a compelling

aff'd, 5 Cir., 437 F.2d 500. Other courts are in accord. The three-judge-court statute, 28 U.S.C. § 2281, "has no relation to Habeas Corpus proceedings". United States ex rel. Murphy v. Warden of Clinton Prison, N.D.N.Y.1939, 29 F.Supp. 486, 489, aff'd, 2 Cir., 108 F.2d 861, cert. denied, 309 U.S. 661, 60 S.Ct. 583, 84 L.Ed. 1009. See also United States ex rel. Laino v. Warden of Wallkill Prison, S.D.N.Y.1965, 246 F.Supp. 72, 92 n. 16, aff'd, 2 Cir., 355 F.2d 208; United States ex rel. Robinson v. York, D.Conn.1968, 281 F.Supp. 8, 12; Tedder v. Cox, W.D.Va.1970, 317 F.Supp. 33, 35 n. 1.

4. Although the issue is not raised by the parties, we note a *Wingo* problem lurking here. See Wingo v. Wedding, 1974, — U.S. —, 94 S.Ct. 2842, 40 L.Ed.2d — [1974]. In *Wingo* the Supreme Court held that under the Magistrates Act of 1968, 28 U.S.C. § 635(b), a magistrate has no authority to conduct an evidentiary hearing on a habeas corpus petition. Since we grant Dorrough relief on the grounds that the Texas statute is unconstitutional, we do not reach the *Wingo* issue.

state interest. In support of this position, Dorrough relies on Griffin v. Illinois, 1956, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Douglas v. California, 1963, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811, and numerous related cases.[5] The thrust of this line of decisions is that a state may not discriminate against defendants on account of their poverty in parceling out rights of the accused. Plainly, the cases demonstrate that "once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts". Rinaldi v. Yeager, 1966, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577. The cases do not, however, accord equal access to appellate review the status of a fundamental interest capable of triggering strict scrutiny.[6]

[2, 3] The Supreme Court has recently declared that the determination of what interests are to be considered "funda-

5. See, e. g., Mayer v. Chicago, 1971, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (denying free transcript to indigent appealing from nonfelony convictions violates equal protection); Tate v. Short, 1971, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (imprisonment of indigent as satisfaction of traffic fines violates equal protection); Williams v. Illinois, 1970, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (imprisonment of indigent beyond statutory maximum term for failure to pay fine and court costs violates equal protection); Williams v. Oklahoma City, 1969, 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440 (denial of free transcript necessary for indigent to perfect appeal from drunken driving conviction violates equal protection); Rinaldi v. Yeager, 1966, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (withholding indigent inmate's pay to reimburse county for cost of transcript furnished for unsuccessful appeal violates equal protection); Smith v. Bennett, 1961, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (requiring indigents to pay filing fee before state habeas petition is considered violates equal protection).

6. The Court has, it is true, used the word "fundamental" loosely in the context of equal access to criminal appeals. In Rinaldi v. Yeager, for example, the Court said: "[I]t is now fundamental that once established, these avenues [of appellate review] must be kept free of unreasoned distinctions . . . ." 384 U.S. at 310, 86 S.Ct. at 1500. We believe, however, that this use of the word is not intended to invoke the strict standard of review. We note that Rinaldi v. Yeager was decided under the rational relationship test. See *infra*. See also Mayer v. Chicago, 1971, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372.

mental" for purposes of choosing the proper standard or review under the equal protection clause should begin with an examination of substantive constitutional safeguards. Writing for the Court in San Antonio Independent School District v. Rodriguez, 1973, 411 U.S. 1, 33–34, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16, Justice Powell described the inquiry as whether the interest involved is "explicitly or implicitly guaranteed by the Constitution". Appeals from state criminal convictions are not so favored. It has long been established that the federal Constitution does not require states to provide appellate review: "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. . . . It is wholly within the discretion of the state to allow or not to allow such a review". McKane v. Durston, 1894, 153 U.S. 684, 687, 14 S.Ct. 913, 915, 38 L.Ed. 867; Griffin v. Illinois, *supra*, 351 U.S. at 18, 76 S.Ct. 585. Of course, the Constitution requires that when provided appeals must comport with principles of due process and equal protection. Pate v. Holman, 5 Cir. 1965, 341 F.2d 764, 773 n. 10, modified on other grounds, 343 F.2d 546. But the fourteenth amendment protections may not be used to bootstrap the stricter standard of review for equal protection analysis. There are present here none of the substantive constitutional rights found at the heart of those "fundamental interests" that trigger strict scrutiny.[7]

[4] Although in dismissing Dorrough's direct appeal Texas has employed a harsh sanction, the severity of the detriment caused by the classification provides no key to whether the interest infringed is "fundamental". See San Antonio Inde-

7. Compare, e. g., Roe v. Wade, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (privacy); Dunn v. Blumstein, 1972, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (voting); Police Department of City of Chicago v. Mosley, 1972, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (free expression); Shapiro v. Thompson, 1969, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (interstate travel); Sherbert v. Verner, 1963, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (free exercise of religion); Skinner v. Oklahoma, 1942, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (procreation).

pendent School District v. Rodriguez, *supra*, 411 U.S. at 33, 93 S.Ct. 1278. Recognizing the importance of the interests concerned, the Supreme Court has nevertheless refused to accord welfare benefits,[8] housing,[9] education,[10] and discharge in bankruptcy [11] preferred status under the equal protection clause.[12] Faced with a paucity of logical limitations once an interest is declared "fundamental" and the compelling state interest test is brought to bear, the Court has balked.[13] See Note, New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet, 58 Va.L.Rev. 930, 941 (1972). Instead of broadening the reach and number of fundamental interests, the Court has found flexibility in the other prong of equal protection analysis, the rational relationship test.

8. Jefferson v. Hackney, 1972, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285; Dandridge v. Williams, 1970, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491. See also Richardson v. Belcher, 1971, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231.

9. Lindsey v. Normet, 1972, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36.

10. San Antonio Independent School Dist. v. Rodriguez, 1973, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16.

11. United States v. Kras, 1973, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626.

12. The Court has also been reluctant to increase the number of suspect classifications. See San Antonio Independent School Dist. v. Rodriguez, 1973, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (wealth); Kahn v. Shevin, — U.S. —, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) (gender); Weber v. Aetna Casualty & Surety Co., 1972, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (illegitimacy).

13. One commentator has described the inherent difficulties in expanding the "strict scrutiny" standard of review as follows:

> Every interest which triggered active review took on the authority of a formal catagorical imperative. Once established, it applied to any and all situations; there was no way to control it. Each new fundamental interest or suspect classification traveled with increasingly cumbersome precedential baggage as more competing rights were swept aside. It became apparent that like strategic nuclear weapons the active standard of review . . . could not be used without absolute commitment and wanton destruction.

Note, The Decline and Fall of the New Equal Protection: A Polemical Approach, 58 Va.L.Rev. 1489, 1496 (1972) (footnote omitted).

[5, 6] Under "traditional" equal protection analysis, legislative classifications are permitted if they are rationally related to a legitimate state interest. See United States Department of Agriculture v. Moreno, 1973, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782. Commentators have often noted that, at least at one time, this test seemed heavily weighted in favor of upholding the classification.[14] It was a test of "minimal scrutiny". Today, however, whatever it may have been in the past, the rational relationship standard is relatively strict. Recent Supreme Court cases teach that the test calls for a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.[15]

Under the Texas statute Dorrough is a member of a narrow and special class of criminal defendants—those defendants convicted and sentenced to terms of years in felony cases who escape and do not return voluntarily within 10 days. Tex. Code Crim.Proc.Ann. art. 44.09. The statute does not affect the right of appeal of those who escape before trial or sentencing. McGee v. State, Tex.Cr.App.1969, 445 S.W.2d 187, 190. It does not affect escaping nonfelons. And, although it provides for dismissal of appeals of escaping defendants sentenced to death or life terms, it provides more liberally for reinstatement of these appeals.

[7] The appellee argues that the statute treats equally all those within the subject class; that is, all convicted defend-

14. See, e. g., Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1, 18–19 (1972); Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1087 (1969); Note, New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet, 58 Va.L.Rev. 930, 937 (1972).

15. See, e. g., United States Department of Agriculture v. Moreno, 1973, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782; Weber v. Aetna Casualty & Surety Co., 1972, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768; Eisenstadt v. Baird, 1972, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349; Mayer v. Chicago, 1971, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372; Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.

ants who, like Dorrough, escape from confinement after being sentenced to a term of years and do not voluntarily return within 10 days are treated alike in being deprived of any pending direct appeal. That fact is uncontested. But as the Supreme Court noted in McLaughlin v. Florida, 1964, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, our inquiry must go further. "Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose". See Rinaldi v. Yeager, *supra*, 384 U.S. at 309, 86 S.Ct. at 1499. The classification must include "all persons who are similarly situated with respect to the purpose of the law." Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341, 346 (1949); see F.S. Royster Guano Co. v. Virginia, 1920, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989.

[8] We conclude that the classification drawn by article 44.09 is irrational in view of its obvious purpose—to discourage convicts from escaping from confinement and to promote the prompt and voluntary return of those who do escape.

[9] First, the statute is underinclusive. It does not apply to those who escape prior to sentencing. McGee v. State, *supra*, 445 S.W.2d at 190. In fact, it appears that only those who have appeals actually pending at the time of escape lose their right to appeal. A convicted felon who escapes and returns after being sentenced but before his record of appeal is filed with the Court of Criminal Appeals may still be able to prosecute an appeal.[16] Moreover, those convicted of misde-

16. An appeal is not perfected under Texas law until the record of appeal is filed with the Court of Criminal Appeals. McGee v. State, Tex.Cr.App., 445 S.W.2d 187, 190. In Webb v. State, Tex.Cr.App. 1970, 460 S.W.2d 903, the defendant escaped on May 27, 1969, and was recaptured on October 13, 1969. Because his record of appeal was not filed until May 18, 1970, however, the State's motion to dismiss the appeal under article 44.09 was denied.

meanors do not lose their right to appeal if they escape while their appeals are pending. Although we recognize that the State's interest may be greater in reducing the number and duration of escapes of felons than of nonfelons, this does not itself excuse the underinclusiveness of the statute.

Second, the different treatment of the appeals of defendants who are sentenced to terms of years and defendants who are sentenced to life terms or death is without a rational basis. The statute provides, on the one hand, for setting aside the order dismissing the appeal of one sentenced to a term of years only upon "voluntary" return within 10 days. Recapture does not qualify as "voluntary" return. See, e. g., Holliday v. State, Tex.Cr.App.1972, 482 S.W.2d 215; Pendergrass v. State, Tex.Cr.App.1922, 92 Tex.Cr.R. 467, 244 S.W. 513. On the other hand, escapees under death or life sentences may have their appeals reinstated if they return within 30 days after their escape. And they need not return voluntarily; their appeals may be reinstated also if they are recaptured during the 30 day period.[17] Due to the irrevocability of death, capital convictions may be sui generis. Griffin v. Illinois, *supra*, 351 U.S. at 21, 76 S.Ct. 5850. (Frankfurter, J., concurring). We see no basis in logic, however, for treating those with life sentences differently from all those who are sentenced to terms of years. A defendant sentenced to a term of years may spend as long or longer behind bars than one sentenced to life. Indeed, Texas law treats equally for parole purposes those sentenced to life and those sentenced to terms of 60 or more years; all are eligible to be considered for parole

17. Thus, had Dorrough been under a life sentence, after his recapture the Court of Criminal Appeals could have reinstated his appeal. See Foster v. State, Tex.Cr.App.1973, 497 S.W.2d 291; Steese v. State, Tex.Cr.App.1960, 170 Tex.Cr.R. 269, 340 S.W.2d 49. In Palmer v. State, Tex.Cr.App.1935, 128 Tex.Cr.R. 293, 81 S.W.2d 76, 77, the court stated that it was its "duty" to decline to sustain the State's motion to dismiss the appeal of the appellant, who had been sentenced to death, had escaped, and had been recaptured 22 days later.

after serving 20 years.[18] We cannot say that those sentenced to terms of years have a less significant interest in appeal than those sentenced to life imprisonment. Nor can we perceive any relationship between the type of sentence imposed and the potential merit of the appeal. Finally, the State's interest in protecting society from dangerous criminals cannot require that those sentenced to terms of years be treated more harshly for escaping than those sentenced to life. In short, article 44.09 invidiously discriminates against convicted felons sentenced to terms of years. The distinctions drawn by the statute are "unreasoned distinctions" proscribed by the fourteenth amendment. Mayer v. Chicago, 1971, 404 U.S. 189, 196, 92 S.Ct. 410, 30 L.Ed.2d 372; Rinaldi v. Yeager, *supra*, 384 U.S. at 310, 86 S.Ct. 1497. The classification drawn by article 44.09 lacks more than "mathematical nicety". See Lindsley v. Natural Carbonic Gas Co., 1911, 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed. 369. It is "wholly without any rational basis". United States Department of Agriculture v. Moreno, *supra*, 413 U.S. at 538.

[10] We emphasize that it is only the unreasonable classification, not the practice of dismissing or reinstating appeals of escapees, that is objectionable. We do not denigrate the historic reluctance of appellate courts to decide appeals of defendants who escape and refuse to submit to the control of the court below. See Molinaro v. New Jersey, 1970, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586; Bonahan v. Nebraska, 1887, 125 U.S. 692, 8 S.Ct. 1390, 31 L.Ed. 854; Smith v. United

18. Tex.Code Crim.Proc.Ann. art. 42.12, § 15:
(a) The Board [of Pardons and Paroles] is hereby authorized to release on parole, with the approval of the Governor, any person confined in any penal or correctional institution of this State, except persons under sentence of death, who has served one-third of the maximum sentence imposed, provided that in any case he may be paroled after serving 20 calendar years. Time served on the sentence imposed shall be the total calendar time served and all credits allowed under the laws governing the operation of the Department of Corrections, and executive clemency. All paroles shall issue upon order of the Board, duly adopted and approved by the Governor.

States, 1876, 94 U.S. (4 Otto) 97, 24 L.Ed. 32. Nor do we find fault with the Texas statute for providing for the immediate dismissal of appeals of escapees. Such a practice may be administratively prudent, and there is no constitutionally set rule for when dismissal should be made. In *Smith* the Court dismissed the case at the beginning of the following term. In *Bonahan* the Court struck the case from the docket at the end of the term in which it arose. In *Molinaro* the case was dismissed without awaiting "the end of the Term or the expiration of a fixed period of time". 396 U.S. at 366, 90 S.Ct. at 499. And in Van Blaricom v. Forscht, 5 Cir. 1974, 490 F.2d 461, 462 (en banc), this Court removed the appeal from the docket and ordered that if it was not made known to the Court within 30 days that the appellant was available and subject to judgment, his appeal would be dismissed. Accord, United States v. Dawson, 6 Cir. 1965, 350 F.2d 396; see also Eisler v. United States, 1949, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897 (removed from docket), 338 U.S. 883, 70 S.Ct. 181, 94 L.Ed. 542 (cert. dismissed); United States v. Tremont, 1 Cir. 1971, 438 F.2d 1202. Finally, we do not criticize the reinstatement of an appeal upon the return of the appellant to custody. We have ourselves provided for it. See Brown v. United States, 5 Cir., nos. 26,249 & 30,405, May 26, 1971.[19]

19. In the *Brown* case we wrote:

> It is common knowledge that appellant, H. Rap Brown, has disappeared and his present whereabouts are unknown. If his disappearance was willful and he is yet alive he would necessarily be a fugitive from justice. Under these circumstances, the Court, *sua sponte* orders this appeal stricken from the docket of this Court, to be reinstated, on appropriate motion, if and when it should be known to the Court that Brown is available and subject to any judgment which might be entered in this case. See the order of this Court dated February 3, 1971, No. 29,419, Timothy Leary vs. United States of America.

Brown later moved to reinstate his appeal, but this Court did not reach the question of reinstatement. We vacated the judgment and sentence below, because Brown had not been present at sentencing. The cause was remanded for resentencing. "Upon imposition of sentence and entry of judgment, Brown will be under a judgment and sentence from which a timely appeal may be taken." United States v. Brown, 5 Cir. 1972, 456 F.2d 1112, 1114.

[11] Dismissal or reinstatement of appeals of escapees may be based on established and strictly followed policies, or may be left to the discretion of the appellate court. The point, though, is that dismissal or reinstatement may not be based on a policy that invidiously discriminates against certain classes of escapees. We express no opinion as to whether Texas may deny an appeal to *all* convicted individuals who escape, no matter how quickly they are recaptured or even if they return to custody voluntarily. That question is not before us.

When the Texas Court of Criminal Appeals dismissed Dorrough's appeal under Article 44.09 after his escape and recapture, it denied him equal protection of the laws. Dorrough must now be provided a direct appeal from his bank robbery conviction. Unless the State provides him an appeal—or a new trial within a reasonable time, if an effective appeal is not possible—the writ shall issue and the detainer warrant shall be voided.

Reversed and remanded.

RIVES, Senior Circuit Judge (specially concurring):

I concur in the result but not in everything said in the opinion. Insofar as the opinion demonstrates that the classification system established by Article 44.09 does not have a rational relation to a legitimate state purpose and therefore violates equal protection, I heartily agree.

Every statutory classification must meet the rational relationship test. Some classifications, those which are "suspect" and those which deny a "fundamental" right, can be justified only by showing a "compelling" state interest. As to the statutory "first appeal" provided to criminal defendants,[1] it seems to me that a classification which denies any appeal whatsoever to a prisoner who has been recaptured within two

1. Douglas v. California, 1963, 372 U.S. 353 at 356 and 357, 83 S.Ct. 814; cf. Ross v. Moffitt, 1974, — U.S. —, 94 S.Ct. 2437, 40 L.Ed.2d —.

days after escaping can be justified only by showing a "compelling" state interest.[2]

I therefore specially concur.

2. See Mr. Justice Marshall's discussion in dissent in San Antonio School District v. Rodriguez, 1973, 411 U.S. 1, at 102 and n. 61, 93 S.Ct. 1278.

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A P P E N D I X "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JERRY MACK DORROUGH
VS.
W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

CIVIL ACTION NO. CA-3-6278-C

O R D E R

After reviewing the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that all relief sought by applicant is denied.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this order, together with a true copy of the Findings, Conclusions and Recommendation of the United States Magistrate, to applicant, to the Honorable John L. Hill,

Attorney General of the State of Texas, and to the Honorable David M. Ellis, 2424 First National Bank Building, Dallas, Texas.

SIGNED AND ENTERED this 26th day of March, 1973.

/s/
W. M. TAYLOR, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JERRY MACK DORROUGH)
VS.)
W. J. ESTELLE, DIRECTOR,)
TEXAS DEPARTMENT OF CORRECTIONS)

CIVIL ACTION NO. CA-3-6278-C

FINDINGS, CONCLUSIONS AND
RECOMMENDATION OF THE
UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Jerry Mack Dorrough, hereinafter called applicant, was convicted for the offense of robbery on February 6, 1963, in the Criminal District Court No. 3 of Dallas County in Cause No. D-9080-IJ. He

was sentenced to a term of imprisonment of 25 years. On or about May 27, 1963, while his appeal was pending, applicant escaped from the Dallas County jail and did not thereafter voluntarily return. He was apprehended a few days later and returned by the authorities to the Dallas County jail. Thereafter, on motion of the State, the Court of Criminal Appeals dismissed the direct appeal pursuant to the provisions of Art. 44.09, V.A.C.C.P. That statute provides, in substance, that the Court of Criminal Appeals loses jurisdiction to hear an appeal in any case where the defendant escapes and does not voluntarily return within ten days. This statute has been repeated construed to be jurisdictional and there is no exception to its provisions other than the one stated therein. Holliday v. State, 482 S.W.2d 215. At or about the time of this dismissal

the state authorities delivered applicant to federal custody and on June 20, 1963, he was sentenced to a term of 25 years imprisonment after a conviction on his plea of guilty to the offense of robbery in Cause CR-3-63-125, in the United States District Court for the Northern District of Texas. He is presently serving that sentence in a federal institution in Atlanta, Georgia. A detainer has been placed with the federal authorities by the Dallas County authorities as a result of the unserved sentence imposed against applicant after conviction in Cause D-9080-IJ in the Criminal District Court No. 3 of Dallas County, Texas, mentioned hereinabove. Applicant has previously sought to void that detainer by petition to the United States District Court for the Northern District of Georgia based on a contention that the state authorities lost jurisdiction over him by surrendering him to the federal

authorities. That claim was rejected by the district court and its order was affirmed on appeal in the United States Court of Appeals for the Fifth Circuit. Jerry Mack Dorrough v. State of Texas, 440 F.2d 1063.

The complaint now presented to this court relates to the action of the Court of Criminal Appeals in dismissing applicant's direct appeal pursuant to the provisions of Art. 44.09, V.A.C.C.P. Insofar as I can determine, this issue has not previously been presented by applicant to any court.

Applicant has sought permission to file and maintain this action under the provisions of 42 U.S.C. §1983. Apparently applicant and his amicus curiae, the Honorable David M. Ennis, who has filed a brief in applicant's behalf, agree with the proposition asserted by applicant, erroneously I believe, that applicant has

no status to seek relief in the nature of habeas corpus. The pleadings submitted by applicant name the State of Texas as a defendant. I believe it is clear, and I believe the Court has already determined by entry of the order permitting filing of this application, that it cannot be pursued as a civil rights action. I believe it is equally clear, and I believe the court so determined when it entered the order permitting filing of this application, that the relief sought by applicant is in the nature of habeas corpus and that applicant has present status to assert his claim. The State of Texas, who applicant sought to name as a defendant, is not a person amenable to suit under any of the civil rights statutes, including 42 U.S.C. §1983, mentioned by applicant. The substance of applicant's complaint is that the action of the Court of Criminal Appeals

in dismissing his appeal violated his constitutional rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore the detainer is based on an invalid conviction. Clearly such a claim may be asserted in a habeas corpus application if the jurisdictional and custodial requirements of 28 U.S.C. §2241, et seq., are met. I should note that the position taken by respondent that habeas corpus relief is not available to applicant was taken prior to rendition of the recent opinion of the Supreme Court of the United States in Braden v. 30th Judicial Circuit Court of Kentucky, No. 71-6516, February 28, 1973. It is probable that he would no longer seek to defend that position. This court, and I believe the Fifth Circuit Court, had already adopted the two fundamental

concepts of jurisdiction and custody set forth in the Braden case. The Braden case specifically holds that under the standards announced in Peyton v. Rowe, 391 U.S. 54, a prisoner is "in custody" within the meaning of 28 U.S.C. §2241(c)(3) for purposes of a habeas corpus attack on an indictment or judgment of conviction underlying a detainer even though he be physically confined in another jurisdiction. The case further holds that the provisions of 28 U.S.C. §2241(a), providing that the district courts may grant habeas corpus relief ". . . .within their respective jurisdictions", requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner. Further application of the doctrine set out in Ahrens v. Clark, 335 U.S. 188, holding that habeas corpus may be brought only in the district of petitioner's confinement, has been now rejected by the Supreme Court. It

follows that if applicant is in custody by reason of the detainer placed against him resulting from an unserved state sentence, his custodian is respondent. Under the provisions of 28 U.S.C. §2241(d), this court has jurisdiction to hear his habeas corpus complaints pertaining to the sentence imposed against him in this district in the Criminal District Court No. 3 of Dallas County, Texas. I believe it is for the foregoing stated reasons that the Court has considered applicant's pleadings as an application for habeas corpus relief and directed that it be filed as such naming W. J. Estelle, Director, Texas Department of Corrections, as respondent. Process has properly been served on him as such.

Respondent alleges that applicant has failed to exhaust his state remedies. I believe he has exhausted his state remedies within the meaning of 28 U.S.C. §2254(b). It is true that he has filed

no post conviction application in state court for habeas corpus relief. The doctrine of exhaustion of remedies does not require applicant to pursue an application for habeas corpus relief in state court nor any other specific remedy. It requires only that the highest court of the State be given an opportunity to rule on the issue prior to its consideration in this court. Clearly a ruling on the issue presented in the present application is implicit in the judgment of dismissal of applicant's appeal by the Court of Criminal Appeals. Respondent does not suggest any available state procedure whereby applicant might secure a further ruling on the merits on this issue by the Court of Criminal Appeals. The only avenue which might be pursued by applicant would be by a motion to the Court of Criminal Appeals for reinstatement of the appeal. The

filing of such a motion would be untimely by approximately ten years and I believe it may be safely concluded by this court that the Court of Criminal Appeals would not consider it at all. Further, the long and unbroken line of decisions of that court, holding that the court has no jurisdiction to reinstate an appeal on the facts presented in applicant's case, supports a conclusion that the highest court of the State has already conclusively ruled on this issue and that no further effective state remedy is available to applicant. I do not believe the filing of a motion to give the highest court of the State an opportunity to reconsider final action already taken by that court is a necessary step in exhaustion of state remedies.

After concluding, for the reasons stated above, that the Court has jurisdiction to decide applicant's complaint on its merits and that he should not be

required to make any further attempt to exhaust his remedies in state court. I shall discuss the merit of his contention. I believe it fair to say that applicant does not argue that the right to appeal from a conviction in state court is a matter of constitutional right. Nor does he contend that in a proper case a particular class may be excluded by the Legislature of the State of Texas from the right of appeal granted by the Legislature. The substance of his argument is that the denial of the right to appeal to escaped convicts, pursuant to Art. 44.09 V.A.C.C.P., while allowing the right to appeal to all other convicts, is so unreasonable and discriminatory as to constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. To support this argument, I believe he relies primarily on the case

of Rinaldi v. Yeager, 384 U.S. 305 (1966), 16 L.Ed.2d 577 (1966). A comprehensive discussion of the standards to be observed in a determination of this particular issue is contained in the opinion of the Supreme Court of the United States in the case of Morey v. Doud, 354 U.S. 457, an opinion recently cited with approval by the United States Court of Appeals for the Fifth Circuit in the case of Rener v. Beto, 447 F.2d 20. As the Court there noted, the standard which should be used by this court in determining whether or not Art. 44.09 is unconstitutional does not involve a determination as to whether or not the statute is wise or desirable. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220. Legislatures have been given wide powers of discretion when it comes to classification in the adoption of police laws and it is limited only when such classification is without any reasonable basis. The case of Morey v. Doud,

supra, advances the following propositions:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. . . .
>
> 3. . . .
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369.

The ultimate issue is, therefore, whether or not denial by the Legislature of the right to appeal to escaped convicts is purely arbitrary and without any reasonable basis. The burden to make this showing is clearly on applicant. I believe the arguments advanced by applicant, including his argument that federal prisoners who escape do not lose their right to pursue an appeal, is not so persuasive as to discharge that burden. I believe that denial of the right to appeal to one who has escaped from custody and has not voluntarily returned cannot be said to be arbitrary and unreasonable even though it might be concluded by many that such a provision of law is neither wise nor desirable.

RECOMMENDATION:

For the reasons stated hereinabove, I recommend that all relief sought by applicant be denied.

/s/Bailey F. Rankin
United States Magistrate

APPENDIX "D"

Jerry Mack Dorrough, Appellant

No. 36,001. v. ----Appeal from Dallas County

The State of Texas, Appellee

OPINION

The offense is robbery; the punishment, 25 years.

The State has filed a motion to dismiss this appeal and accompanies it with an affidavit showing that appellant has escaped jail. The motion is granted. The appeal is dismissed.

Per Curiam

(Delivered June 19, 1963)

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1973

JERRY MACK DORROUGH,
Petitioner-
Appellant

V.

W. J. ESTELLE, DIRECTOR, TDC
Respondent-
Appellee

Appeal from the United States
District Court
For The Northern District Of Texas

Before RIVES, WISDOM and MORGAN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

July 29, 1974

Issued as Mandate:

August 20, 1974

SUPREME COURT OF THE UNITED STATES

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* JERRY MACK DORROUGH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–479. Decided March 17, 1975

PER CURIAM.

Respondent Jerry Mack Dorrough was convicted in 1963 in a Texas District Court of robbery and sentenced to a term of imprisonment of 25 years. After he was sentenced and had filed an appeal to the Texas Court of Criminal Appeals, he escaped from the Dallas County jail by stealing a federal mail truck. He was recaptured two days after his escape. After his recapture, the Texas Court of Criminal Appeals removed his appeal from its docket pursuant to the provisions of Texas Code of Criminal Procedure Art. 44.09, which provides for the automatic dismissal of such pending appeals by an escaped felon upon escape with provision for reinstatement of the appeal if the felon voluntarily surrenders within 10 days of his escape.[1]

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[1] Texas Code of Criminal Procedure Art. 44.09 provides:

"If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Corrections for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape."

This provision was adopted by Texas in 1879 replacing a somewhat

After recapture, respondent was tried and convicted on federal charges and given a 25-year federal sentence which he is currently serving. The State of Texas has filed a detainer warrant with federal authorities against Dorrough in order to compel him to serve the remainder of his state sentence upon release from federal custody. In 1972, respondent filed in the United States District Court for the Northern District of Texas a complaint which was treated by that court as a petition for writ of habeas corpus, alleging that the 1963 dismissal of his appeal under Art. 44.09 denied him equal protection of the law in violation of the Fourteenth Amendment.[2] The United States District Court denied relief, holding that Art. 44.09 was a rational exercise of legislative power.[3] The

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similar common-law rule discussed in *Ex parte Wood*, 19 Tex. Cr. R. 46 (1885). The clause authorizing discretionary reinstatement of an appeal from a sentence of death or life imprisonment was added by amendment in 1933. Acts 1933, 43d Leg., p. 64, c. 34. Since the statute provides that jurisdiction shall "no longer attach" upon escape, the escape itself divests the court of jurisdiction with later dismissal being a mere formality. *Lafferty* v. *State*, 123 Tex. Cr. R. 570, 60 S. W. 2d 222 (1933); *Ex parte Gurley*, 104 Tex. Cr. R. 578, 286 S. W. 222 (1926).

[2] *Braden* v. *30th Judicial Circuit Court of Kentu* 410 U. S. 484 (1973), indicates that one under a state detainer w nt is considered to be in custody for the purpose of federal ha a relief. The District Court concluded that respondent had pro ly exhausted his state remedies and the petitioner did not urge fai e of exhaustion in the Court of Appeals.

[3] The only contention presented to the District Court as evidenced by its opinion was the constitutionality of Art. 44.09 discussed herein. Respondent seeks here to raise other issues not raised below, at least some of which were considered and rejected by other courts during the course of his five prior actions in the federal system. See *Dorrough* v. *United States*, 327 F. 2d 667 (CA5 1964); *Dorrough* v. *United States*, 344 F. 2d 125 (CA5 1965); *Dorrough* v. *United States*, 397 F. 2d 811 (CA5), cert. denied, 394 U. S. 1019 (1968); *Dorrough* v. *United States*, 440 F. 2d 1336 (CA5), cert. denied, 404 U. S. 915 (1971); *Dorrough* v. *United States*, 440 F. 2d 1063 (CA5), cert. denied, 404 U. S. 840 (1971).

United States Court of Appeals for the Fifth Circuit reversed. It held that Art. 44.09 denied respondent equal protection of the law, and ordered that the State's detainer warrant would be voided unless Texas provided respondent with either a direct appeal or a new trial.[4] Petitioner has now sought review pursuant to 28 U. S. C. § 1254 (1) by certiorari of the judgment of the Court of Appeals. For the reasons stated, we grant the writ and reverse the judgment.

The Court of Appeals correctly recognized that there is no federal constitutional right to state appellate review of state criminal convictions. *McKane* v. *Durston*, 153 U. S. 684, 687 (1894); *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956); *Ross* v. *Moffitt*, 417 U. S. 600, 610–611 (1974). Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law. Note, 18 Geo. Wash. L. Rev. 427, 429 (1950). This Court itself has long followed the practice of declining to review the convictions of escaped criminal defendants. *Smith* v. *United States*, 94 U. S. 97 (1876); *Bonahan* v. *Nebraska*, 125 U. S. 692 (1887); *Eisler* v. *United States*, 338 U. S. 189, 883 (1949); cf. *Allen* v. *Rose*, — U. S. — (December 16, 1974). Thus in *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970), we dismissed the appeal of an escaped criminal defendant, stating that no persuasive reason exists to adjudicate the merits of such a case and that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." *Id.*, at 366. In *Allen* v. *Georgia*, 166 U. S. 138 (1897), we upheld as against a constitutional due process attack a state court's dismissal of the appeal of an escaped prisoner and its refusal to reinstate the appeal upon his later recapture. See also *National Union* v. *Arnold*, 348 U. S. 37, 43 (1954).

[4] The decision of the District Court is unreported. The decision of the Court of Appeals is reported at 497 F. 2d 1007.

The Texas courts have found similar ends served by Art. 44.09. It discourages the felony of escape and encourages voluntary surrenders.[5] It promotes the efficient dignified operation of the Texas Court of Criminal Appeals.[6]

The Court of Appeals, however, found two classifications created by the statute to lack any rational relation to its purposes and hence concluded that the statute was unconstitutional as violative of the Equal Protection Clause.[7] That court recognized that appeals from state criminal convictions are not "explicitly or implicitly

[5] *Rodriquez* v. *State*, 457 S. W. 2d 555, 556 (Tex. Crim. App. 1970).

[6] *Loyd* v. *State*, 19 Tex. Cr. R. 137, 155 (1885). See also Note, 18 Geo. Wash. L. Rev. 427, 430 (1950).

[7] 497 F. 2d, at 1012–1013. The court below specifically rejected the notion that immediate dismissal with refusal to reinstate appeals of escaped defendants was constitutionally objectionable and rested its decision wholly on the asserted lack of rational connection between the statutory classifications and the statute's purposes.

But our Brother STEWART resurrects this rejected argument and adopts it in his dissent, saying that the Texas statute may not rationally be said to discourage the felony of escape and encourage voluntary surrender. Such a judgment, of course, is one in the first instance for the legislature, *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 (1955), and we may strike down such a legislative judgment only if we conclude that it is indeed irrational. We do not believe that it is. Nor is it accurate to suggest that the only purpose served by the Texas statute is the deterrence of escapes: it is also designed to secure the State's interest in orderly judicial procedure. The right of appeal from a judgment of conviction in both the federal and state systems is almost uniformly conditioned, for example, upon the filing of a notice of appeal within a prescribed time limit. See F. R. A. P. Rule 4 (b); n. 10, *infra*. The vindication of orderly procedure secured by the Texas statute under attack here is no less a permissible choice for the legislature than is the vindication of that interest by such procedural requirements. In a case indistinguishable from the present one on this issue, this Court in *Allen* v. *Georgia*, 166 U. S. 138, 141 (1897), upheld the refusal of the Georgia courts to reinstate the appeal of a recaptured prisoner, stating that "it seems but a light punishment for such offense to hold" that he has abandoned such appeal.

guaranteed by the Constitution," *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 33–34, and that this Court in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases had applied the traditional rational basis test. *Rinaldi* v. *Yeager*, 384 U. S. 305. There this Court said:

> "'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' *Tigner* v. *Texas*, 310 U. S. 141, 147. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' *Baxstrom* v. *Herold*, 383 U. S. 107, 111; *Carrington* v. *Rash*, 380 U. S. 89, 93; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415." *Id.*, at 384 U. S. 305, 309.

The Court of Appeals thought that this test rendered the statute invalid for two reasons. First, while the statute provides for reinstatement of the appeal of most escaped felons only if they voluntarily surrender within 10 days, the Texas Court of Criminal Appeals may in its discretion reinstate the appeals of prisoners under a sentence of life imprisonment or death if they are returned to custody within 30 days.[8] Second, the statute applies only to those prisoners with appeals pending at the time of their escape; prisoners who have not invoked the appellate process by filing an appeal at the time of their escape may still appeal after recapture if applicable ap-

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[8] See n. 1, *supra*. The statute merely allows the court in its discretion to reinstate such appeals. In the past, the court has both granted leave to reinstate and refused it under a test of "good cause shown." *Bland* v. *State*, 224 S. W. 2d 479 (Tex. Crim. App. 1949); *Foster* v. *State*, 497 S. W. 2d 291 (Tex. Crim. App. 1973).

pellate time limits have not run. We disagree with the analysis of the Court of Appeals, and find that neither of these distinctions offends the Equal Protection Clause.

Insofar as the separate treatment of prisoners under a sentence of life imprisonment or death is concerned, we see no reason why the Texas Legislature was not free to separate out these two most severe sentences from other terms of imprisonment, and provide an additional period of discretionary review for them but not for the remainder. The Court of Appeals determined that under Texas law a prisoner serving a sentence for a term greater than 60 years would not be eligible for parole any sooner than a prisoner under life sentence, and from that fact concluded that there could be no rational distinction between those serving a life term and those serving a term in excess of sixty years. 497 F. 2d 1007, 1012–1013. It is not altogether clear how respondent, who himself has been sentenced to 25 years, could assert the rights of those under term sentences of 60 years or more.[8] But apart from this difficulty, we see no reason why the Texas legislature could not focus on the actual severity of the sentence imposed in making distinctions, rather than on the collateral consequence of sentence elaborated by the Court of Appeals. The State of Texas could reasonably balance its concern with deterring escapes and encouraging surrenders with its alternate interest in allowing the validity of particularly severe sentences to be tested by appellate review. In doing so, it was not required to draw lines with "mathematical nicety." *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911); *Morey* v. *Doud*, 354 U. S. 457, 463–464 (1957).

Nor do we find the statutory limitation of the dismissal requirement to those prisoners with appeals pending at the time of their escape violative of the Equal Protection Clause. The Court of Appeals felt that the statute was "underinclusive" for this reason, since a prisoner who had

[8] Cf. *United States* v. *Raines*, 362 U. S. 17, 21–24 (1960).

not invoked the appellate process by filing an appeal at the time of his escape might still appeal after recapture if the prescribed times for filing an appeal had not expired.

Criminal defendants in Texas are subject to relatively stringent time limits for filing their appeals.[10] Since an escaped defendant cannot comply with the required appellate steps during the time he is not confined, these time limits serve much the same function as Art. 44.09. Whatever difference in treatment exists between the class of prisoners who escape, return, and are nonetheless able to file an appeal, and those whose appeals are dismissed pursuant to Art. 44.09, is sufficiently rational to withstand a challenge based on the Equal Protection Clause. Texas was free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law. While each class of prisoners sought to escape, the first did so in the very midst of their invocation of the appellate process, while the latter did so before returning to custody and commencing that process. If Texas is free to adopt a policy which deters escapes by prisoners, as all of our cases make clear it is, it is likewise free to impose more severe sanctions on those whose escape is reasonably calculated to disrupt the very appellate process which

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[10] See Tex. Code of Crim. Proc. Arts. 40.05, 40.09, 44.08 *et seq.* For example in the cases cited by the lower court as involving pre-appeal escapes with subsequent appeals, the appellants forfeited substantially all of their appeal through failure to file a timely record or bill of exceptions. *Webb* v. *State*, 460 S. W. 2d 903 (Tex. Crim. App. 1970); *McGee* v. *State*, 445 S. W. 2d 187 (Tex. Crim. App. 1969). In Texas the trial judge has the power to file the record with the Court of Criminal Appeals and if he does so prior to recapture of an escaped defendant, the appeal is dismissed under Art. 44.09. *Webb* v. *State*, 449 S. W. 2d 230 (Tex. Crim. App. 1969); *Redman* v. *State*, 449 S. W. 2d 256 (Tex. Crim. App. 1970); *Ballage* v. *State*, 450 S. W. 2d 823 (Tex. Crim. App. 1970).

they themselves have set in motion."[11] *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974).

The motion of respondent for leave to proceed *in forma pauperis* and the writ of certiorari are granted and the judgment of the Court of Appeals for the Fifth Circuit is

Reversed.

MR. JUSTICE DOUGLAS, dissenting, agrees with much of the dissenting opinion of MR. JUSTICE STEWART, but unlike him, would also affirm the judgment for the reasons stated by the Court of Appeals, 497 F. 2d 1007, 1012–1014 (CA5 1974).

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[11] The peculiar problems posed by escape of a prisoner during the on-going appellate process were explored in *Loyd* v. *State*, 19 Tex. Crim. R. 137 (Tex. Crim. App. 1885) in the course of upholding the constitutionality of this statute:

". . . [L]et us suppose that the convict, pending his appeal, should escape and remain at large twenty or thirty days; what disposition should be made of his appeal? . . . Should this court wait until his return to custody? How long must it wait? Until it suits the prisoner's convenience? . . . [W]e are of the opinion that [Article 44.09] is not only reasonable but eminently wise." *Id.*, at 155.

See, e. g., Allen v. *Georgia*, 166 U. S. 138, 141 (1897).

UPREME COURT OF THE UNITED STATES

J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* JERRY MACK DORROUGH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74-479. Decided March 17, 1975

IR. JUSTICE STEWART, with whom MR. JUSTICE BRENand MR. JUSTICE MARSHALL join, dissenting.

the shortcomings of the challenged Texas statute only those addressed by the Court, I could join the rt's opinion. For I agree that Art. 44.09 is not ered unconstitutional by its more lenient treatment caped felons under sentence of death or life imprison-, nor by its asserted "underinclusive" inapplicability felon who escapes and is returned to custody involun- before his appeal is filed. But I think the Court ailed to come to grips with the real constitutional t in the challenged statute.

summarily reversing the judgment before us the relies upon decisions establishing the long-settled tice of declining to review the convictions of escaped nal defendants." *Ante*, at slip op. 3. See *Smith nited States*, 94 U. S. 97 (1876); *Bonahan* v. *ska*, 125 U. S. 692 (1887); *Molinaro* v. *New Jersey*, . S. 365 (1970). See also *Allen* v. *Georgia*, 166 138 (1897). But these decisions have universally nderstood to mean only that a court may properly s an appeal of a fugitive convict *when, and because,* not within the custody and control of the court. oday, this Court has never intimated that under le of *Smith*, *Bonahan* and *Molinaro* a court might s an appeal of an escaped criminal defendant at a

time when he has been returned to custody, and thus to the court's power and control.*

The rationale for the dismissal of an appeal when the appellant is at large is clearly stated in the *Smith* decision:

> "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case." 94 U. S., at 97.

See also *Bonahan* v. *Nebraska*, 125 U. S. 692.

Here, as the Court notes, Dorrough was recaptured two days after his flight. And, as the Court also notes, his appeal was dismissed *after* his recapture. In this situation, the rule of *Smith-Bonahan-Molinaro* provides no support whatever for the Texas law that deprived Dorrough of his right to appeal.

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*The Court in *Molinaro* relied upon a Note, 18 Geo. Wash. L. Rev. 427, 430 (1950), which is cited in the Court's opinion today. *Ante*, slip op. 3. The rule and its rationale are correctly stated in that Note: "A review of criminal appeal cases both in state and federal courts shows that when an appellant has escaped from custody and cannot be brought before the court, his case is not left pending indefinitely. In the absence of any statutory regulation, dismissal is granted in some form . . . . The basic theory behind all criminal cases has always been that there must be a defendant in the power and under the control of the court, and that there be some one who can respond to the judgment. Note, *supra*, at 428–429.

If the challenged statute can be sustained, it must rest upon the alternative ground advanced by the Court—that, as a punitive and deterrent measure enacted in the exercise of the State's police power, it "discourages the felony of escape and encourages voluntary surrender." But the statute imposes totally irrational punishments upon those subject to its application. If an escaped felon has been convicted in violation of law, the loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose convictions would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon the circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions. In my view, this random pattern of punishment cannot be considered a rational means of enforcing the State's interest in deterring and punishing escapes. Cf. *McLaughlin* v. *Florida*, 379 U. S. 184, 191 (1964); *Rinaldi* v. *Yeager*, 384 U. S. 305, 309 (1966); *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 538 (1973).

A closely analogous case was considered by the Supreme Court of Idaho in *In re Mallon*, 16 Idaho 737. There the court considered a statute providing:

> "Every state prisoner confined in state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison."

The court concluded that the statute at issue was unconstitutional. Similarly the Supreme Court of Kansas in *State* v. *Lewin*, 53 Kan. 679, held unconstitutional a statute providing that upon escape a convict was to be

unished by imposition of the full term of the sentence
nder which he had initially been imprisoned, without
edit for any time served before the escape.

Under these Idaho and Kansas statutes, two men
caping at the same time and in the same manner could
ceive wholly different sentences, not related at all to
e gravity of the offense of escape. That is precisely
e vice of the Texas statute at issue in the present case.
I would affirm the judgment of the Court of Appeals.